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CHARGING AND PROSECUTION POLICIES IN CASES OF SPOUSAL ASSAULT: A SYNTHESIS OF RESEARCH, ACADEMIC, AND JUDICIAL RESPONSES

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FINAL REPORT

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The views expressed herein are solely those of the authors and
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Charging and Prosecution Policies in Cases of Spousal Assault: A Synthesis of Research, Academic, and Judicial Responses

November 2000

[Author's Note: For the purposes of the following discussion, the terms "domestic violence", "spousal assault", "spousal abuse", and "partner abuse" are used interchangeably to describe the physical or sexual abuse, actual or threatened, of adult persons in intimate relationships by their adult partners.]

Introduction

The purpose of this review was to provide a synthesis of the social science research, academic commentary, and Canadian jurisprudence addressing the effectiveness of the policies in achieving their goal of reducing the incidence of spousal abuse in Canada.

Charging and prosecution ("no-drop") policies were introduced in Canada in the early 1980s, beginning with federal guidelines issued to the Royal Canadian Mounted Police and federal and territorial Crown prosecution offices in 1983. By 1985, some form of spousal assault policy was in place in most of the provinces of Canada. The policies were implemented in response to what was perceived to be an inadequate criminal justice system response to incidents of spousal violence. The policies were designed to counter the notion that spousal violence is a private affair, and instead give it recognition as a serious social problem, which is also a violation of the law. Police intervention and Crown prosecution of spousal abuse incidents were seen as critical elements of an overall societal response to the problem. The implementation of the policies was also seen as an important step towards protecting individual victims. By placing the onus for laying charges on the police and Crown, the victim could indicate to her abusive partner that the decision to proceed was not hers, and thereby reduce the potential for violent recriminations. The ultimate goal of the policies was to achieve a reduction in the incidence of spousal violence in Canada.

It became clear over the course of preparing this report that most provinces and territories in Canada either have some form of charging and prosecution policy presently in place, or are working towards the implementation of such a policy. The prevalence of such policies as a governmental response to the problem of spousal abuse warrants a close analysis of their effectiveness in achieving their stated goal reducing the incidence of spousal abuse in Canada.

The following report presents a synthesis of research literature that evaluates the effectiveness of these policies in reducing the incidence of recidivism, and research that assesses the perceptions of female victims of domestic violence, the police, and prosecutors as to the effectiveness and ultimate value of these policies as implemented. The report canvasses academic literature that both challenges the assumptions underlying

the policies and suggests alternative avenues of reform. Finally, the report examines Canadian jurisprudence that addresses issues arising out of the implementation of charging and prosecution policies.

An analysis of the research literature reveals that the effectiveness of charging and prosecution policies in reducing domestic violence is the subject of considerable debate among social science researchers and academics. Much has been written about perceived deficiencies in the policies and the ways in which they are implemented, including the oft-made criticism that the policies serve to "re-victimize" the survivor of a spousal abuse incident. The policies remove the onus from the victim to lay charges against her abuser, thereby reducing the risk that the victim will be blamed by the abuser for the abuser's prosecution. As a consequence, however, many victims feel disempowered by a legal process that deprives them of any say in the ultimate disposition of charges and which often operates against their wishes to withdraw from the system. It is somewhat ironic that charging and prosecution policies were in part implemented as a response to the perceived need for criminal justice professionals to treat domestic violence "like any other crime". The deficiencies identified in these policies are frequently rooted in their failure to recognize that spousal assault is *not* a crime like others. Unlike violence between strangers, domestic violence victims may live with their assailants, often have strong emotional and financial bonds, often share children, and often do not wish the relationship to end. All of these factors create complications for victims, police officers and prosecutors that are seldom present in cases of violence between strangers (Martin & Mosher, 1999; Johnson, 1996; Ursel & Brickey, 1996). Research that evaluates how these participants in the criminal justice process view the effectiveness of "zero tolerance" policies is synthesized herein.

Studies directed at assessing the success of such policies in reducing the incidence of spousal abuse have produced mixed results, as have those studies attempting to gauge the reactions of women, police, and Crown prosecutors to the implementation of the policies. Moreover, some prominent feminist academics have called for the abolition of the charging and "no drop" prosecution policies currently in place throughout Canada.

Canadian jurisprudence on the subject of mandatory charging, meanwhile, has been sparse. While policies of mandatory charging and prosecution tend to bring more domestic violence cases before the courts, the central purpose of the judicial inquiry is to determine whether an offence has been committed, and not to assess the wisdom of the policy that brought the case before the courts. The existence of the policy itself is collateral to the determination to be made before the courts, that is, whether the guilt of the accused of the offence charged has been proven beyond a reasonable doubt. Commentary on the charging and prosecution policies is therefore rarely included in the written reasons for a judge's decision. However, the persistent concern over the role of the "reluctant victim-witness" in cases of spousal assault has occasionally provoked commentary in judicial decisions, as discussed below.

1.0 EFFECTIVENESS OF THE POLICIES IN ACHIEVING DETERRENCE

Charging and prosecution policies are directed toward achieving goals of both general and specific deterrence. The arrest and public prosecution of abusive spouses is intended to send a message to the public that spousal abuse is both morally and legally wrong (general deterrence), and to deter individual abusive spouses from engaging in further violence against their partners (specific deterrence) (Johnson, 1996). The ultimate goal of such a policy is to reduce the incidence of domestic violence.

A number of Canadian and American studies aimed at assessing the impact of charging policies in reducing the incidence of violence have produced mixed results. Jaffe, Reitzel, Hastings, and Austin (1991) examined the impact of a newly implemented police charging policy in London, Ontario, over a ten-year period. The authors reported that the implementation of the policy resulted in a dramatic increase in police-laid charges in cases of domestic violence. In 1979, the year prior to the introduction of the policy, police officers laid charges in only 3% of the occurrences involving spousal assault. By 1983, the figure had risen to 67% and by 1990 to 89%. The authors also assessed the extent and severity of violence used by males 12 months before police intervention and 12 months after police intervention. In the majority of cases, the authors reported a significant reduction in the level of violence after police intervention and the laying of a charge by police.

Similar findings were made by American sociologists Sherman and Berk (1984), who found in experiments in Minneapolis that arrested abusive partners manifested significantly lower levels of subsequent violence than those who were only given a warning or ordered to leave the premises. Indeed, compared to arrest, the temporary separation of the victim and offender resulted in two-and-a-half times the number of repeat incidents. Victim interviews also indicated that fewer repeat incidents occurred after arrest than after the use of any other police intervention strategy.

Replication studies of the Sherman and Berk (1984) study conducted in six American cities have, however, produced conflicting results (Schmidt & Sherman, 1993). While in some cases arrest had a crime-reduction effect, particularly for those perpetrators who were employed, married and had earned a secondary school diploma, it was concluded in other instances that arrest actually had a long-term criminogenic effect, increasing the violence among unemployed, unmarried, and racial minority abusers. These findings raise the concern that the implementation of pro-arrest policies will have an unequal impact on victims in different social settings and, indeed, benefit some victims to the detriment of others.

Plecas, Segger, & Marsland (2000) recently examined the extent to which a mandatory charging policy implemented in Abbotsford, B.C. was successful in reducing subsequent violence against a victim of domestic violence. The study surveyed 74 female victims of domestic violence to determine levels of repeat violence after the initial police

intervention. The results of the study indicated that 43% of offenders re-assaulted their victim with the 27-month follow-up period. The authors noted important correlations between the ultimate disposition of the case, and the likelihood of repeat violence. In cases where charges were stayed, which accounted for 40% of all dispositions, the victim was re-assaulted in 54% of the cases. Cases where the accused partner was acquitted, which accounted for 3% of all dispositions, resulted in re-assault 100% of the time (note: due to the small number of cases this represents 2 women re-assaulted after acquittal). Dispositions by peace bond, probation, jail, or fine resulted in lower levels of re-assault. The authors concluded that a relationship existed between the staying of charges and the likelihood of re-assault, however as noted, due to the small number of cases involved any conclusions should be considered with caution.

Studies on the deterrent effect of mandatory charging and pro-arrest policies are generally regarded in the academic literature as inconclusive and warranting further research. Even the work of Jaffe et al (1991) is subject to the authors' own caveat that their results may not be generalizable to other communities because the study took place within a community that had developed a highly co-ordinated and integrated response to domestic violence. It has also been suggested that the difficulties associated with measuring the deterrence value of a prosecution policy are insurmountable, as incidents of recidivism after an abuser's initial arrest may be attributable to any combination of factors. As Faubert and Hinch (1996) have noted, where an abusive partner assaults his spouse after having been arrested, it should not be assumed that the arrest itself, isolated from other factors, is the sole cause of the behaviour. Abusive behaviour subsequent to arrest may be attributable to the difficulties associated with marriage breakdown, separation, and divorce, a period in which the increased risk of physical abuse for women has been well documented. Moreover, Plecas, Segger, and Marsland (2000) found that the single best predictor of re-assault was the offender's *previous criminal history*. Once again, however, it should be noted that no tests of statistical significance were reported on this finding.

Research to date has not assessed victim perceptions of the relationship between the initial charge, arrest, and/or prosecution of the abuser, and later acts of violence. To what extent survivors of violence attribute post-arrest acts of violence to the initial intervention of criminal justice authorities could prove quite valuable in measuring the effectiveness of charging and prosecution policies in reducing the incidence of domestic violence.

2.0 VICTIM PERSPECTIVES ON THE POLICY

A number of Canadian studies have examined the response of female victims of violence to the implementation of charging and prosecution policies. One fairly consistent theme emerging from research evaluating victim perspectives on the policy is a strong degree of support for mandatory charging and arrest among female victims of violence, but a substantial degree of dissatisfaction with the policy of mandatory prosecution.

Jaffe et al (1991) found that victim satisfaction with police response to incidents of domestic violence increased dramatically following the implementation of a mandatory charge/arrest policy in London, Ontario. Between 1979 and 1990, victim satisfaction with police response increased from 48% to 65%. Moreover, 87% of the victims in the study indicated that they would call the police again. This feeling among the victims in the study appears to be corroborated by evidence in the study that the victims surveyed in fact continued to contact the police for assistance on successive occasions. Frequency of calls to police increased following the target incident.

Jaffe et al (1991) also reported an increase in satisfaction with Crown attorneys between 1979 and 1990. In 1979, only 31% of victims reported feeling satisfied with the assistance of Crown attorneys. This figure had risen to 41% by 1983 and, by 1990, 65% of the victims reported feeling "a sense of complete support" from the Crown attorneys with whom they had been in contact (Jaffe et al, 1991, p.82). It is interesting to note in this regard that by 1990, only 10.9% of all charges were dismissed or withdrawn, compared with 16.4% in 1983 and 38.4% in 1979.

Roberts (1996) found high support for the mandatory charging policy among victims of domestic violence in the Yukon Territory. Eighty-five percent of victims in the Yukon felt that the mandatory charging policy was a good one, and 68% felt that their experience with mandatory charging made them "more or less confident about reporting a future incident of assault". The author notes that support for the policy was "primarily based on the notions that spousal assault is a serious matter, that there should be a clear societal message that it is unacceptable, and that victims or potential victims need protection from assaultive spouses" (Roberts, 1996, p.21).

While victim respondents in the Yukon study indicated basic support for the charging policy, the author found considerable division over whether mandatory charges should lead to mandatory prosecution (Roberts, 1996, p.22). Almost all of the victims in the study engaged the criminal justice system because they wanted to feel safe, while many wanted assistance in establishing a non-violent relationship. Approximately half of the respondents considered that the utilization of a more flexible post-charge approach would be more appropriate. Prosecution of the spouse was often perceived to be contrary to victims' needs to be treated with concern, interest, and respect. Victim dissatisfaction with their experiences with the Crown was usually related to little or no contact with the Crown and lack of information.

Plecas, Seggar, and Marsland (2000) conducted a survey of 74 female victims of domestic violence in Abbotsford, British Columbia. The primary purpose of the study was to determine the extent to which victims supported the policy, their reasons for non-cooperation (i.e., no support for the prosecution to go forward), and the extent to which the policy has helped reduce subsequent violence against the victim. The results of the study indicated widespread support among victims for the policy and the way in which it was implemented. Specifically, 86% of victims stated that they agreed with the policy, and the same percentage stated that they were satisfied with the way in which the police dealt with their cases. Also, 82% agreed with the policy of mandated "no-contact" orders, which prohibit the offender and victim from having contact with each other for some period of time after the offender's arrest. As well, while nearly half of the victims surveyed (49%) expressed some reservations about the conditions associated with no-contact orders, overall 86% agreed with the conditions and 82% ultimately complied with them. This support for the policy persisted in spite of the fact that 30% of the victims reported suffering financially following the offender's arrest, 62% of offenders didn't fully comply with the conditions of the no-contact order, and 43% of offenders re-assaulted their victim within the 27 month follow-up period. It is also noteworthy that 90% of the victims interviewed indicated that they would call the police again.

Although a large majority of victims in the B.C. study expressed support for the policy, a significant percentage of them proved to be uncooperative. Forty percent of victims indicated that they did not wish to proceed with the prosecution of the offender (although 20% did eventually cooperate in the prosecution). The main reason cited by victims for lack of cooperation was their desire to reconcile with the offender (72% of victims). Indeed, 39% of victims wanted contact with the offender, and 29% asked for the no-contact order to be dropped. Among those who wanted the no-contact order dropped, 81% cited a desire for reconciliation as the basis for this, while 19% wanted to grant the offender access to his children.

Light and Rivkin (1996) interviewed a sample of eight women who had encountered criminal justice interventions that mandated the charging and prosecution of their spouses. The study gauged their perceptions of how they were treated by the justice system, and the institutional support they believed they required in order to remain supportive of the proceedings being taken against their abusive partner. While most of the women in their study felt they had received adequate or appropriate support from the police, they seemed to feel far less supported in their encounters with Crown counsel. The relief they felt when they were able to relinquish responsibility for stopping the violence by involving the police appeared to be replaced by frustration and feelings of powerlessness as they moved deeper into the system. Their complaints included not having an opportunity to meet the Crown until the actual court day, not being adequately informed of what would be expected of them in court, not feeling that they were being taken seriously, and having to tell their story to several different Crown counsel. Better support in these areas would presumably provide greater impetus for them to remain in the system.

The complexity of female victims' perceptions of charging and prosecution policies has most recently been commented on in a study conducted in Ontario. Landau (2000) found that, when asked specifically whether they wanted the police to lay charges in their case, 60% of victims responded affirmatively. The most common reason identified by the women in support of charging was that it would teach the abuser not to repeat the violence and that it was a crime to assault someone (22%). Significantly, 80% of the women interviewed agreed with the policy to lay charges against the wishes of *other* women.

While there seemed to be strong general support for the existence of a mandatory charging policy, the Landau study reported that the subsequent prosecution of their spouses resulted in anxiety and uncertainty for many of the women. The author asserts, on the basis of respondents' comments in an open-ended question component of the study, that for many women, the prosecution of their spouses was "a highly disempowering experience" (Landau, 2000, p.147). According to the author, the most frequent and consistent feedback from women was the need for more information about the court process, trial dates, release dates for the accused, and court outcomes. An unfortunate limitation of the study in this regard is that it presents no statistical evidence indicating levels of approval or disapproval among the women who encountered the mandatory prosecution policy. The author only notes that, while 80% of women agreed with the charges that were laid, 32% asked to have the charges dropped. Though the author ultimately argues against the use of charging and prosecution policies, the research she presents does not appear to provide any clear support for her conclusion that such policies are misdirected. Rather, this conclusion appears to be drawn from the author's own perception of deficiencies in the political, ideological, and symbolic rationales for the policy, and in the "professional limitations, shortcomings or lack of commitment to reducing violence against women" (Landau, 2000, p.153) that she perceives among criminal justice professionals.

A recent American article focussing on victim rationales for refusing to co-operate with the prosecution of abusive spouses may provide some guidance in understanding the apparent disparity between victim support for charging versus prosecution policies. Bennett, Goodman and Dutton (1999) have identified a number of obstacles facing victims of domestic violence who are involved in the criminal prosecution of an abusive partner:

- Confusion about the process and the consequences of prosecution for herself and the accused, resulting from the insufficient provision of information about the case and the criminal process itself;
- The length of the criminal process, including numerous trips to the courthouse. Lack of contact with the court during this lengthy period serves to exacerbate victim frustration.
- Fear of the offender during the time leading up to the trial.
- Conflict over the possibility of incarceration of the abusive partner. This is particularly so where victims need child support from the abusive partner or are otherwise economically dependent on the partner.

- Victims may wish to leave the system after it has met their needs – they may use the system as an immediate intervention to help manage the violence, and then disengage from the system after this need has been met.

Ursel (1998) has also commented on the need for Crown attorneys and police to understand that women who make complaints of abuse by their partners, yet recant at later dates, are using the criminal justice system as a strategy of resistance that does not conform to the logic of prosecution. In making and withdrawing complaints, women search for bargaining tools and tactics to help them survive abusive relationships. These women are struggling to protect themselves and their children through realistic and attainable means.

The cumulative effect of recent Canadian research suggests that there exists a fairly strong degree of support for mandatory charging and arrest policies among female victims of domestic violence, but a significant degree of uncertainty among these same women in their feelings about mandatory prosecution policies. In general, female victims of abuse appear to favour a system that puts an end to the immediate violence, but that allows them some involvement in the decision of Crown counsel whether or not to proceed with the prosecution of their partner. Many victims feel disempowered by the loss of all control over the handling of their case. In many cases, the prosecution policy conflicts with the victim's desire to reconcile with her partner. Moreover, much of the frustration felt by victims appears to stem from the inadequate provision of information about the prosecution process itself, and about the progress of victims' individual cases. These deficiencies in pro-prosecution policies as presently implemented will need to be addressed if victim endorsement of such policies is to be achieved.

3.0 POLICE PERSPECTIVES ON THE POLICY

In the London, Ontario study, Jaffe et al (1991) noted a trend that indicated growing police support for the mandatory charging policy over the course of its implementation. Fifty percent of officers in 1990 felt that the policy was effective in helping battered women and stopping family violence, compared with only 33% in 1985. Two-thirds of the officers agreed that the policy promoted an important message to the community. Further, 77.5% of the officers believed that victims were more likely to follow through with a prosecution when police lay charges than when the victim did. However, 35% of the police surveyed felt that the implementation of the policy had some negative side effects, including victims of domestic violence being hesitant to call police. Similarly, 30% of police officers in a study conducted by the Women's Policy Office in Newfoundland and Labrador thought that the charging policy made female victims' lives more difficult (Newfoundland, 1993).

The suggestion in the study of Jaffe et al (1991) that police conformity to the mandatory charging policy gradually increased over time, has been reinforced to some degree by the experience in Manitoba. Ursel and Brickey (1996) documented a 145% increase in spousal assault charges over an eight-year period following the introduction of a police charging policy. The researchers' data suggested that police compliance with the policy was gradual and became more consistent over the years.

Interestingly, in the study conducted by Jaffe et al (1991), the most progressive views about the value of the charging policy were held by supervisory police officers and officers with four or more years of experience. Similar findings have been derived from a questionnaire aimed at gaining a better understanding of front-line officers' perceptions of a pro-charge policy implemented in Metropolitan Toronto. Hannah-Moffat (1995) found that six of seventeen officers supported the policy, and that support for the policy was divided by years of experience: all six officers supporting the policy had a minimum of seven years experience on the police force.

The Jaffe et al (1991) study also asked officers to rank in order of importance the factors that influenced their decision to lay an assault charge in response to a domestic violence call. Overall, officers chose the existence of corroborating evidence as the primary factor, with the apparent willingness of the victim to testify and the apparent seriousness of victim injuries identified as secondary factors. The use of such "legal factors", such as availability of evidence, and "quasi-legal factors", such as victim co-operation, to determine if arrest is warranted has been of some concern to researchers. Faubert and Hinch (1996), for example, have noted the possibility that the interpretation of such legal factors may be influenced by individual officer perceptions, the use of stereotypes, and conceptualizations of gender roles. Moreover, Hannah-Moffat (1995) has noted that non-legal factors, such as the attitude of the offender and victim towards the police and the presence of alcohol or drugs, are important factors influencing the police decision to lay a charge.

While there are some indications that police are increasingly complying with domestic violence charging protocols, it is clear that further research is needed to assess the consistency with which this is being accomplished across the country. It is equally clear that more extensive research needs to be undertaken to evaluate the factors which lead officers to lay charges and make arrests in some situations, but not in others. Until further research in these areas is undertaken, it will be difficult to formulate any hard conclusions as to the extent to which mandatory charging policies have been "accepted" and properly adhered to by the police officers responsible for implementing them.

4.0 PROSECUTOR PERSPECTIVES ON THE POLICY

In an anecdotal report based on interviews with twenty Crown attorneys in Canada, Macleod (1995) reported on a number of dilemmas and frustrations faced by Crown attorneys faced with mandatory prosecution or "no drop" directives. While the report does not purport to reflect the experiences of all Crown attorneys across Canada, it highlights some of the concerns and frustrations held by those charged with the responsibility of prosecuting domestic violence offences under a prosecution policy. Among the concerns identified by the Crowns interviewed:

- Prosecution policies are counterproductive and do not reflect the wishes or needs of the victim.
- Successful implementation of the policy required more time and resources than could reasonably be dedicated by Crown attorneys; policy did not reflect the realities of daily Crown work.
- The policy treats all wife assault cases as the same, which fails to recognize that Crowns are dealing with individuals in individual situations.
- Removal of Crown discretion inhibits the ability to meet professional responsibilities; discretion is the key to dealing with wife assault cases sensitively and appropriately.
- Rigid policies are making the women in the most danger turn away from the system.
- The policy revictimizes many women.

It is important to emphasize that the above concerns should not be taken to represent the views of all or even a majority of Crowns. As the author notes, "[t]he Crowns who agreed to speak with me anonymously were enthusiastic about having an opportunity to give voice to the challenges and frustrations they are experiencing. However, the author approached several other Crown attorneys who said they experience no dilemmas and are totally in accordance with the policies concerning wife assault in their province or territory" (Macleod, 1995, p.49).

Persistent feelings of frustration among Crown counsel with uncooperative or recanting victim-witnesses has been well documented (Ursel & Brickey, 1996; Law Reform Commission of Nova Scotia, 1995). The perceived insensitivity of Crown counsel to victim needs has also been the subject of considerable criticism by feminist scholars and social science researchers (see for example Landau, 2000; Martin, 1998). However, Ursel (1998) and Ursel and Brickey (1996) have isolated an area within the Canadian criminal justice system where "Crown culture" has been redefined in a manner that has allowed the dual and often contradictory mandates of rigorous prosecution and victim sensitivity to co-exist.

As part of the Family Violence Court project in Winnipeg, Manitoba, specialized courts and prosecution units were designed in an effort to change the "work culture" and concepts of success that had until that time prevailed in Crown prosecutors' offices and operated as impediments to the successful prosecution of domestic assault cases (Ursel & Brickey, 1996). Prior to specialization, cases known as 'domestics' were considered low-profile, messy cases with poor prospects for conviction and were therefore not considered rewarding cases for Crowns to take on. With the introduction of the specialized courts and prosecution units, however, 'domestics' were redefined as high-priority cases requiring skilled and sensitive lawyers (Ursel, 1998; Ursel & Brickey, 1996).

The greatest apparent benefit of this change in work culture has, according to Ursel (1998) and Ursel and Brickey (1996), been the redefinition of success in spousal assault cases among Crown attorneys in the Family Violence Court. In response to these altered conditions, Crown attorneys in the specialized Prosecutorial Unit have introduced a number of creative strategies that have helped them to achieve high conviction rates despite the perpetual challenge of reluctant witnesses. Foremost among these strategies is that of "testimony bargaining", a process similar to plea bargaining which instead focuses on Crown negotiation with the victim-witness. As Ursel (1998) notes, typical testimony bargaining patterns unfold in the following way. A victim indicates to the Crown that she will not testify because she does not want her husband jailed. The Crown then asks the victim what outcome, ideally, she would like to see. More often than not, she simply wants the violence to end. In response, the Crown might offer to drop the most serious charge that could lead to a jail sentence, and agree to recommend probation and court-mandated treatment in exchange for her testimony. If she agrees, the Crown notifies the defence that the witness will testify and, most often, the case is resolved through a guilty plea (Ursel, 1998, p.78).

It is clear that more research is needed to accurately gauge the perceptions of mandatory prosecution policies among Crown attorneys. The experience documented by Ursel (1998) and Ursel and Brickey (1996) in the Family Violence Court in Winnipeg, however, seems an appropriate model from which to approach the often competing concerns of rigorous prosecution and sensitivity to the victim within a policy of mandatory prosecution of domestic violence cases.

5.0 ACADEMIC AND PUBLIC SUGGESTIONS FOR REFORM

> Given that women need protection and call the police for that protection, how should police respond? In the past, police frequently did not respond, were slow arriving at the scene, reluctant to believe victims.... Arrests were infrequent. The battered women's movement, shelter workers, and victims criticized police, arguing that failure to intervene implicated the police and the criminal justice system in perpetuating the problem. Today we have come full circle. As more police departments arrest offenders, we hear pro-arrest and mandatory-arrest policies criticized on the grounds that the police are a blunt and repressive tool, as likely to re-victimize as rescue victims...
> Ursel, J.E. (1998), Mandatory Charging: The Manitoba Model at p.74.

Martin and Mosher (1995) have challenged the ability of an aggressive criminal justice intervention to work consistently as a specific deterrent to spousal abuse, to change abuser's attitudes, or to heal men and address the underlying causes of the violence. They have also challenged the degree to which charging and prosecution policies provide protection to women, arguing that the validity of the policies presupposes that men are aware of the policies, that they understand them, and that they will not assault their partners if their partners have no say whether charges are laid or a prosecution proceeds. In regard to this last item, the authors note that batterers frequently blame their partners for things over which the partner has no control, and wonder why charges laid by police would be treated any differently.

In light of these propositions, Martin and Mosher (1995) have recommended that the present criminal justice intervention, characterized by mandatory charging and "no-drop" prosecution policies, should be abandoned. In their place, the authors propose a model of criminal justice intervention characterized by the exercise of informed choice. One suggested mechanism for satisfying the needs of the victim is the provision of an advocate to provide full and accurate information about the criminal process, about the prospects of reform for the batterer, and about the supports realistically available. Women should be allowed resort to the full criminal justice response should they choose to utilize it.

Under the Martin and Mosher model, police response to calls of domestic violence would include:

- A requirement that police respond to the call;
- Police must treat the call seriously (this does *not*, however, necessitate a charge);
- The woman must not be asked at the time of crisis whether she wishes charges to be laid;

- Police take whatever steps are necessary to ensure the woman's immediate safety, including removing the batterer, ensuring that the woman receives medical attention, taking a woman to a shelter or safe place, or arrest of the batterer where circumstances require.

- In every case, something significant should happen. Police must communicate through their words and actions that the abusive conduct is serious and wrong.

The model also recognizes that a criminal justice intervention, if appropriate at all, is only one among a multitude of services and interventions that may be needed.

Landau (2000) has also questioned the utility of continued reliance on policies of charging and prosecution that, in her view, silence and disempower female victims of violence to an even greater degree than before the introduction of the policies. While Landau does not suggest any alternative suggestions for reform beyond redirecting funds to shelters, legal aid, social assistance and the like, she perceived a number of weaknesses in the ways in which police officers and Crown attorneys carry out their duties. The author reported finding that police rarely documented independent, material evidence of an assault and that, in the vast majority of cases, the only evidence in the file was the statement taken from the victim even though there were witnesses to the assault in over 50% of the cases. Lack of case preparation by the Crown was also cited as a problem with the present system. Landau notes that in fewer than 30% of the cases studied did the victim report meeting with the Crown attorney before the case came to court. Almost 60% of the women reported meeting the Crown for the first time on the day of the trial. The author does not however indicate whether she would support the policy if these reported deficiencies were addressed.

Where feminist critiques like those of Martin and Mosher (1995) and Landau (2000) have called for the end of mandatory charging and prosecution policies, others have argued that such policies continue to play an important role in combatting domestic violence. Ginn (1995, p.9), for one, has argued that the question of whether or not to use the criminal law to counter domestic violence may be an academic debate that women experiencing violence cannot afford:

> [U]ntil major social changes occur, the legal system, flawed as it is, may represent the only possibility of protection for some battered women and their children. To abandon efforts to improve the legal response would be to abandon those battered women who turn to the legal system for assistance.

Drumbl (1994) has argued that the complete absence of any arrest policy is a non-solution, whereas returning the onus to the victim to lay charges herself has been proven only to perpetuate the cycle of violence. Moreover, Drumbl argues, even if not conclusively proven to deter wife assault, arrest clearly has a positive impact in ensuring the immediate protection of the victim for long enough to allow the victim to make alternate accommodation arrangements. "The simple fact that pro-arrest policies have rough edges does not mean they should be jettisoned...The real challenge is thus to render these policies sufficiently flexible and contextual so that they can effectively meet

the needs of the victim as well as of society more generally": Drumbl, para.68. The author goes on to suggest that a pro-arrest policy with clear guidelines and some narrow discretion to be exercised by the police might be an optimal compromise.

Light and Rivkin (1996) have commented on the current tendency for feminists and advocates who support criminal justice system intervention to part ways with feminists and advocates who have serious concerns about the direction that intervention takes. While the authors agree that there is no question that women may experience charging and prosecution policies as fundamentally disempowering, they assert that such policies have gone a long way toward sensitizing the justice system's approach to violence against women in relationships. They have increased awareness and knowledge about the extent, seriousness and dynamics of family and sexual violence and about victims' reluctance to participate in the justice system. Further, Light and Rivkin argue that a thorough police investigation or Crown prosecution of a wife assault matter can empower a woman by validating her position. Being taken seriously by the justice system can help her to disengage from an abusive relationship and re-establish control in her life.

After extensive public consultations, the Law Reform Commission of Nova Scotia in 1995, released its final report on domestic violence. Entitled "From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia", the Commission considered the "double victimization" of women that may result where victim-witnesses are forced to testify in criminal prosecutions against their spouse. The Commission, while in favour of mandatory charge and prosecution protocols, identified as crucial in the implementation of such protocols that every effort be made to go to trial using evidence other than that of the victim. In its recommendations, the Commission included the direction to police and prosecutors to ensure that all possible evidence is gathered and full statements taken at the time of the call and that all records of earlier or related incidents are obtained. By reducing the incidence of victim-witnesses taking the stand, the Commission hoped to minimize further harm to the victim by eliminating the need for her attendance at the trial of her partner or spouse.

Ursel (1998, p.74) states the fundamental challenge of charging and prosecution interventions as such:

> The question becomes: Is it possible to provide a responsible safety/crisis intervention system without re-victimizing the victim? The answer, I believe, lies not within police departments alone, but within the web of intervening and interacting agencies such as criminal justice and social service systems.

Indeed, Jaffe et al (1991) were of the opinion that the success they reported of the mandatory charging policy in London, Ontario was in large part due to the availability and effectiveness of specialized services in the community. The lesson, at least in this respect, appears to be clear: In jurisdictions committed to retaining or implementing aggressive policies of charging and prosecution in domestic violence cases, the availability of information and services to victims of crime can be expected to increase victim satisfaction with the process.

6.0 JUDICIAL COMMENTARY ON THE POLICY

Judicial commentary on the desirability or efficacy of charging and prosecution policies in the context of domestic violence has to date been sparse. This can likely be attributed to the fact that the ultimate role of the judge as trier of fact in a judicial process is to determine the innocence or guilt of the person charged with an offence. The fact that a particular accused is before the justice system as a result of a policy aimed at catching more offenders in the criminal justice net is largely collateral to this determination of guilt or innocence. As such, an individual judge's perception of, or opinion on such a policy is rarely included in written reasons for decision. While Jaffe et al (1991) noted police perceptions that the judiciary was unsupportive of the mandatory charging policy, no Canadian research has to date evaluated judicial opinion on charging and prosecution policies.

Two fairly prominent and widely cited cases have, however, provided insight into the policy debate surrounding the Crown's ability to compel an assaulted spouse to take the stand against his or her partner, and the consequence of proceedings against such a spouse when the spouse refuses to testify.

In *R.* v. *McGinty* (1986), 27 C.C.C. (3d) 36 (YTCA), a decision of the Yukon Territory Court of Appeal, the accused, Ms. McGinty, was charged with assault causing bodily harm in an incident involving an attack against her then-boyfriend with a meat cleaver. The issue before the Court was whether the alleged victim, Mr. McKnight, was both a competent and compellable witness for the prosecution against his spouse. Mr. McKnight had indicated to the Crown his desire not to testify.

In a decision concurred in by Taggart J.A., McLachlin J.A. (as she then was) upheld the trial judge's decision that Mr. McKnight was both competent and compellable to testify against his spouse. It was clear to Madame Justice McLachlin that policy plays a large part in resolving the question of the compellability of a wife or husband to testify against his or her spouse in a case arising from an act of violence against the witness spouse:

> On the one hand, it is desirable that persons who commit crimes of violence against their spouses be effectively prosecuted. On the other, it is contended, compelling a husband or wife to testify against his spouse will disturb marital harmony and is repugnant to fair - minded persons.

McLachlin J.A. noted that the interest of society in prosecuting persons who commit violent crimes against their spouses is vital. She also noted that, because such crimes tend to be committed in the privacy of the home, it is very often difficult to prosecute them unless the victim-spouse testifies. Whether out of fear of further abuse or pressure from the accused spouse, the battered spouse often refuses to testify at trial.

In balancing the competing interests at stake, McLachlin J.A. concluded that a rule which leaves to the husband or wife the choice of whether to testify against the aggressor spouse is more likely to be productive of family discord than prevent it. In McLachlin's view, leaving the choice with the victim-spouse would expose him or her to further threats and violence aimed at preventing him or her from testifying, and leaves the assaulted spouse open to further recriminations if he or she chose to testify. For these reasons, McLachlin J.A. concluded that "as a matter of policy husbands and wives should be competent and compellable witnesses against each other in cases of crimes of violence perpetrated by the one against the other".

R. v. *Moore,* (1986) 30 C.C.C. (3d) 328 (NTTC) involved a contempt of court proceeding in the Northwest Territories Territorial Court against an accused who refused to testify at the trial of her common law husband on a charge of assault against her. At the trial of her partner, the accused was compelled by the Crown to take the stand. The exchange between the Crown (Mr. Shipley), the witness Moore, and the judge went as follows:

Crown: And do you recall what happened on the 11th of August this year?

Witness: Yeah, but I refuse to talk about it.

Crown: You remember what happened?

Witness: Yeah.

Crown: Can you tell the judge what happened?

Witness: No. All I have to say, it was my fault, because I stole that truck and...

Crown: Well, what was your fault?

Witness: (No verbal answer).

THE COURT: Answer the question, please, Ms. Moore.

Witness: I refuse to talk about it, I said.

THE COURT: Well, I'm directing you to answer the question , Ms. Moore. You've taken the stand, you've been sworn.

Witness: Well, I already told him before I came in here I wasn't going to testify.

Crown: Your Honour, Perhaps your Honour could direct the – or advise the witness as to her susceptibility to contempt charges if she refuses to answer a question that is a proper question.

THE COURT: Ms. Moore, you've taken the stand, you've allowed yourself to be sworn; you've sworn to tell the truth. There has been a proper

question put to you, you are under an obligation to reply to that question. If you refuse to reply to proper questions, you can be cited for contempt, and the penalties for contempt can be a fine or imprisonment or both.

Witness: I still refuse to testify.

Crown: Those are all the questions I have, Your Honour. I invite you to consider whether the witness should be held in contempt. I appreciate that these are very difficult matters for the court to deal with. They are difficult matters for the Crown prosecutor to deal with. And Your Honour is probably aware of similar circumstances arising in Ontario within the last year or so. The incidence of spousal assaults is such that – and the circumstances surrounding spousal assault are such that an action has to be taken by the court to prevent intimidation of witnesses and that sort of thing. I appreciate it's somewhat unreal to sanction the allege victim in a case, but I see no other alternative, Your Honour.

THE COURT: Well, Ms. Moore, I'm really not anxious nor am I particularly desirous of citing you for contempt; but something has – at least the Crown is alleging that something has occurred, something that's serious and something that the court should be looking at. The matter is before the court. And if people aren't going to testify, it destroys the whole system of justice that we have.

I'm going to adjourn this matter until this afternoon at two o'clock. I want you to think about the situation you are in. I've already told you, you can be cited for contempt for refusing to reply. I can only say to you that if there is any question of threat or duress or if someone is twisting your arm, so to speak, to persuade you not to speak

Witness: No, nobody's –

THE COURT: -- and I would strongly suggest that you make arrangements to get some legal advice, and you can do that between now and when we deal with this case again at two o'clock. If Mr. Reid can't assist you, he can put you in contact with lawyers from Yellowknife who can at least advise you over the telephone as to what to do. Do you understand that?

Witness: Mm'hmm.

(*R.* v. *Moore*, *supra* at 331-332)

The trial judge noted that the case against Ms. Moore arose out of a policy of the federal government, applicable to the Northwest Territories, mandating that all complaints of domestic violence involving spousal assault were to be investigated immediately and prosecuted regardless of the wishes of the assaulted spouse. The trial judge also remarked that the change in policy had not had the beneficial effect originally anticipated.

In the judge's view, the indication was that in certain circumstances when victims knew that the police would lay charges they were sometimes reluctant to call police.

In the judge's opinion, the defendant was in a sense a victim, and a deterrent sentence would only serve to increase the degree of victimization. However, the defendant's choice not to testify totally frustrated the State's case against the original accused and further frustrated the State's valid interest in the protection of society and the prevention of domestic violence. The judge noted, "Too often this court has presided over spousal assault cases where the victim takes the stand and through swollen lips and with eyes bruised shut, suddenly becomes reticent and unable to recall when and how her injuries occurred." The defendant here had, in the judge's view, blatantly and wilfully defied the law. In the result, the judge concluded as follows:

> It would appear, at least in this defendant's situation, that the existence of the criminal court, the police and the law by itself and with the well reasoned intentions behind a policy which ultimately brought this woman to court, will not prevent spousal assaults, and will not resolve the problem of spousal assault. In my view there is nothing this court can do with respect to the matter before it, this criminal court cannot resolve all of society's problems, one of which is being a witness who does not want to testify against her spouse. There will be a fine of one dollar.

One further case is worth noting. In *R.* v. *Lafferty* [1999] N.W.T.J. No. 66, the Northwest Territories Supreme Court heard an appeal from a spouse convicted of assault against his spouse. At trial, defence counsel had asked the trial judge to draw an adverse inference against the Crown from its failure to call the complainant as a witness in the proceedings against the accused. In his decision, the trial judge refused to draw such an adverse inference:

> I'm very conscious of the obligation on the Crown to prove its case beyond a reasonable doubt and I'm doubly conscious in light of the fact that one of the witnesses – or one of the participants in this even was not called. I'm also cognizant that she's his wife and that we're in an era where the Crown is facing an impossible situation of calling witnesses they know may lie or recant because of a family or emotional connection with an accused. I think that sometimes if the Crown take those matters into consideration, it's commendable that they do no taint the process by bringing witnesses into Court that patently lie.

The appellant argued that in so deciding, the trial judge in effect reversed the inference to be drawn from the complainant's failure to take the stand. The appellant argued that the comments revealed the trial judge's assumption that the complainant was not called because she would lie on the stand, in other words, that the trial judge drew the inference that the accused really did assault the complainant.

The Northwest Territories Supreme Court acknowledged that the comments of the trial judge were "unfortunate" (at para. 12), but rejected the appellant's submission that the trial judge assumed the guilt of the accused on this basis. The trial judge made a thorough review of the evidence before him, and there was ample evidence upon which he could reasonably convict. There was nothing to suggest that the failure of the Crown

to call the complainant as a witness influenced his conclusion that the charge had been proven beyond a reasonable doubt. The conviction was consequently upheld.

While prevailing judicial attitudes towards the implementation of charging and prosecution policies can certainly not be extrapolated from these three decisions, these cases do show that the courts are at least cognizant of the difficulties that such policies can present once a case reaches the courtroom. The fact scenarios that arise in each case highlight the tension that exists between the oft-competing goals of prosecutorial rigour and sensitivity to the victims of violence. It is clear that the conflict between charging and prosecution policies and the wishes of victims of domestic violence has not gone unrecognized in the courts.

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